In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1278

CHARLES R. ARMSTRONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A1–A6) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 24, 1969. The petition for a writ of certiorari was filed on April 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioner's discharge from federal employment was carried out in accordance with applicable regulations.

350-545—69

REGULATIONS INVOLVED

The Veterans Administration Policy Manual, MP–5, TS–118 (July 1, 1962), provides in pertinent part:

> 14. DEMOTION OR REMOVAL FOR INEFFICIENCY
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> * * * * *
>
> c. Steps in Procedure. * * * [B]efore taking action to remove an employee for inefficiency, the supervisory official should consider reassignment or demotion if there is a vacant position in which the employee could reasonably be expected to perform adequately. * * *
>
> * * * * *
>
> f. *Demotion or Removal for Inefficiency When Employee's Current Performance Rating Is Satisfactory*
>
> (1) An employee may be demoted or removed for inefficiency in spite of a current official performance rating of satisfactory or better. * * * The charges must not consist solely of incidents which occurred prior to the assignment of the current satisfactory rating, but rather should relate primarily to subsequent developments.

STATEMENT

Petitioner brought this action in the Court of Claims for back pay due by reason of an allegedly wrongful discharge. The material facts are not in dispute and may be summarized as follows:

Petitioner was a GS–11 architectural engineer with the Veterans Administration. On February 28, 1963, he received an "Advanced Warning of Unsatisfactory Rating," and on June 20 he was notified of

certain deficiencies in his work. On October 21, petitioner received notice that the "Advanced Warning" had been withdrawn due to a procedural error, so that he would be considered to have a satisfactory rating as of April 30, 1963, but that the notice of deficiencies remained in effect. On the same day, he received a "Proposed Removal for Inefficiency" notice. This document contained seven charges, each citing numerous examples of errors in petitioner's work. Four of the charges related to projects assigned to petitioner before April 30, 1963, but at least one of these projects had been submitted to his superiors after this date.

Petitioner responded to these charges at an agency hearing. Some of the allegations of error were subsequently withdrawn, but the agency found that those remaining were sufficient to warrant removal, and petitioner was removed for inefficiency on July 17, 1964. This action was upheld by the Civil Service Commission Appeals Examining Office and the Board of Appeals and Review. Petitioner then brought this action in the Court of Claims.

The court granted the government's motion for summary judgment. It found that there was nothing in the record to support petitioner's allegation that the agency could have found a lower-grade job for him rather than terminate his employment (Pet. App. A3). The court also considered the satisfactory rating as having been "assigned" according to its terms, namely, as of April 30, 1963 (Pet. App. A4). With respect to the claimed violation of the regulations concerning the requirement that charges "relate pri-

marily to" developments subsequent to a rating of satisfactory, the court stated (Pet. App. A4):

> [T]he charges are worded to specify the dates when the work in question was assigned to plaintiff and not the dates when he submitted the work. Four of the projects were assigned before April 30, 1963, and plaintiff relies on the assignment dates to base his charges that more of the incidents relate to dates before the effective date of the rating and that therefore the incidents do not "relate primarily to subsequent developments." But we think that the critical dates for determining whether the incidents "relate primarily to subsequent developments" are the dates the work was submitted or perhaps later dates when the work was reviewed rather than the dates the projects were assigned to plaintiff, because not until the work was submitted could plaintiff's superior have been aware of the errors in his work. Four of the projects were submitted after April 30, 1963, and thus, in terms of sheer numbers, the charges relate primarily to developments subsequent to the effective date of his satisfactory rating.

The court concluded that "it is clear that the agency did follow its own regulations in removing plaintiff" (Pet. App. A6).

ARGUMENT

The decision below was plainly correct and further review is not warranted. The only questions involved concern the application of concededly valid procedural regulations to the particular facts of this case.

The employing ageny, two appeal boards of the Civil Service Commission and the Court of Claims have examined these facts. All have decided that the notice of satisfactory rating was effective as of April 30, 1963, that the charges related primarily to events subsequent to that date, and that demotion rather than discharge was not feasible. There is no occasion for additional examination of these issues by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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